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No. 90-1141

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1990

RAFEH-RAFIE ARDESTANI,

*Petitioner,*

*v.*

UNITED STATES DEPARTMENT OF JUSTICE  
IMMIGRATION & NATURALIZATION SERVICE,

*Respondent.*

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE  
AMERICAN IMMIGRATION  
LAWYERS ASSOCIATION**

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## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
STATEMENT OF INTEREST .....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	4
I. Application of the EAJA to Administrative deportation proceedings is consistent with the language of the Act and the clear intention of Congress .....	4
II. Section 292 of the Immigration and National- ity Act, 8 U.S.C. § 1362, does not bar fee shifting.....	18
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	21

## TABLE OF AUTHORITIES

Cases:	Page
<i>American Tobacco Company v. Patterson</i> , 456 U.S. 63 (1982) .....	8
<i>Ardestani v. U.S. Dept. of Justice, Immigration and Naturalization Service</i> , 904 F.2d 1505 (11th Cir. 1990) .....	8
<i>Bob Jones University v. U.S.</i> , 461 U.S. 574 (1983) .....	8
<i>Bridges v. Wixon</i> , 326 U.S. 135 (1945).....	16
<i>Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	14
<i>Clarke v. INS</i> , 904 F.2d 172, 175 (3rd Cir. 1990) .....	8, 17, 19
<i>Commissioner, INS v. Jean</i> , 110 S.Ct. 2316 (1990).....	5, 11
<i>Escobar-Ruiz v. INS</i> , 787 F.2d 1294 (9th Cir. 1986)	15
<i>Escobar-Ruiz v. INS</i> , 838 F.2d 1020 (9th Cir. 1988)	8
<i>Franchise Tax Board of California v. U.S. Postal System</i> 467 U.S. 512 (1984).....	10
<i>General Electric Company v. Gilbert</i> , 429 U.S. 125 (1978) .....	7
<i>INS v. Cardoza Fonseca</i> , 480 U.S. 421 (1987) ....	7
<i>Irwin v. Veterans Administration</i> , 111 S.Ct. 453 (1990) .....	10
<i>Library of Congress v. Shaw</i> , 478 U.S. 310 (1986)	9
<i>Lok v. INS</i> , 548 F.2d 37 (2nd Cir. 1977) .....	17
<i>Marcello v. Bonds</i> , 349 U.S. 757 (1955) .....	6
<i>McGloughlin v. Richland Shoe Company</i> , 486 U.S. 128 (1988) .....	7

## TABLE OF AUTHORITIES — (Continued)

Cases:	Page
<i>Montilla v. INS</i> , 926 F.2d 1162 (2nd Cir. 1991)...	17
<i>National Wildlife Federation v. FERC</i> , 870 F.2d 542 (9th Cir. 1989).....	19
<i>National Wildlife Federation v. Marsh</i> , 721 F.2d 767 (11th Cir. 1983).....	7
<i>Newport News Ship Building and Dry Dock v. EEOC</i> , 462 U.S. 669 (1983) .....	7
<i>Owens v. Brock</i> , 860 F.2d 1363 (6th Cir. 1988) ...	11
<i>Perez-Perez v. Hansberry</i> , 781 F.2d 1477 (11th Cir. 1986) .....	18
<i>Pierce v. Underwood</i> , 487 U.S. 552 (1988) .....	5
<i>Richardson v. Perales</i> , 402 U.S. 389 (1971) .....	14
<i>Rubin v. U.S.</i> , 449 U.S. 424, (1981) .....	7
<i>Ruckelshaus EPA v. Sierra Club</i> , 463 U.S. 680 (1983) .....	9
<i>Sullivan v. Hudson</i> , 109 S.Ct. 2248 (1989) .. 5, 11, 14	
<i>Tulalip Tribes v. FERC</i> , 749 F.2d 1367 (9th Cir. 1984) .....	19
<i>U.S. v. James</i> , 478 U.S. 597 (1986) .....	7
<i>Watford v. Heckler</i> , 765 F.2d 1562 (11th Cir. 1985)	19
<i>Wolverton v. Heckler</i> , 726 F.2d 580 (9th Cir. 1984)	19
<i>Woodby v. INS</i> , 385 U.S. 276 (1966).....	17
<i>Statutes and Regulations:</i>	
5 U.S.C. § 504(a)(1) .....	<i>passim</i>
5 U.S.C. § 504(b)(1)(C) .....	<i>passim</i>
5 U.S.C. § 554 .....	<i>passim</i>

TABLE OF AUTHORITIES — (Continued)

<i>Statutes and Regulations:</i>	Page
8 U.S.C. § 1158 .....	17
8 U.S.C. § 1251 .....	17
8 U.S.C. § 1252 .....	2, 4, 6, 9
8 U.S.C. § 1253 .....	17
8 U.S.C. § 1254 .....	17
8 U.S.C. § 1362 .....	3
28 U.S.C. § 2412 .....	18
8 CFR § 3.12-3.38 .....	4
28 CFR § 0.115 et seq. ....	4
46 Fed. Reg. 32,900 (1981) .....	14
46 Fed. Reg. 48,921 (1981) .....	6
<i>Legislative History:</i>	
H.R. Rep. No. 96- 1418, 96th Cong., 2d Sess. (1980) .....	12, 13
H.R. Rep. No. 99-120, (1985) .....	13
S. Rep. No. 96-253, 96th Cong. 1st Sess. (1979) ..	12
<i>Other Authorities:</i>	
C. Sands, Sutherland on Statutory Construction § 60.01 (4th ed. 1984 and Supp 1989) .....	11
United States General Accounting Office, Asylum Approval Rates for Selected Applicants, Pub. No. GGD -87- 82 FS (June 1987) .....	17

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STATEMENT OF INTERESTS

Amicus AMERICAN IMMIGRATION LAWYERS ASSOCIATION is a national association of practicing lawyers and law school professors who practice and teach in the fields of immigration and nationality law. AILA has as its objectives, to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto, and to facilitate the administration of justice therein; and to evaluate the standard of integrity, honor, and courtesy of

those appearing in a representative capacity in immigration, nationality, and naturalization matters.

The membership of amicus practice regularly before the Immigration and Naturalization Service (hereinafter INS) in all of its districts nationwide, including all district levels of the Executive Office for Immigration Review (hereinafter EOIR), and the Board of Immigration Appeals; amici appear as well before the federal district courts and federal circuit courts of appeal of the United States, and have argued matters of immigration, nationality, and naturalization before the Supreme Court of the United States.

AILA has a direct and serious interest in the development of the immigration law and in the case now before this Court. The issue upon which the court has granted *certiorari* directly involves the practice of immigration law and the interest of AILA's members. Whether qualifying aliens and their counsel will be able to recover attorney's fees in deportation proceedings brought by the federal government, is of direct interest to AILA's membership and its ability to represent individuals who otherwise would likely go unrepresented.

The familiarity of amicus with the nature of the proceedings involved, and the public interest at stake lead amicus to believe the court would benefit from the additional legal argument and interpretation with respect to the substantive question of law here at issue.

### SUMMARY OF ARGUMENT

Deportation proceedings conducted pursuant to 8 USC § 1252 are adversary adjudications within the meaning of 5 USC § 504(a)(1). The definition of "adversary adjudication" contained at 5 USC § 504(b)(1)(C) including adjudications "under § 554" of Title Five where the position of the United States is represented by counsel, includes within it deportation

proceedings. The statutory phrase "an adjudication under § 554" is susceptible to an interpretation of "as defined by" or "under the meaning of".

The statutory statement of purpose, the structure of the Act, and legislative history support this construction. The Congressional reauthorization of EAJA supports a construction of the definition of an adversary adjudication that will effect the remedial purposes of the Act.

The views of the Administrative Conference of the United States (ACUS) were specifically contemplated by Congress to be considered and are entitled to deference. The Court should adopt (ACUS) position that when a party is subject to a trial type proceeding where the government takes a position and is represented in administrative proceedings an "adversary adjudication" takes place.

The overriding statutory purpose of EAJA, to provide for representation for individuals and small companies in litigation against the federal government, would be served by the application of EAJA to deportation proceedings. The application of EAJA to administrative deportation proceedings would not unduly burden the government, would deter unreasonable governmental conduct, and be of critical importance to asylum seekers and other individuals of limited means subject to deportation proceedings.

The provision in 8 USC § 1362 of a right to counsel "at no expense to the government" does not preclude fee shifting. This statutory provision is limited to a preclusion of claim of a right to counsel at government expense and has no application to the question as to whether the federal government is subject to a fee award where its position in an adversary adjudication is not "substantially justified".

## ARGUMENT

### I. APPLICATION OF THE EAJA TO ADMINISTRATIVE DEPORTATION PROCEEDINGS IS CONSISTENT WITH THE LANGUAGE OF THE ACT AND THE CLEAR INTENTION OF CONGRESS.

Deportation proceedings are conducted pursuant to 8 USC § 1252. The right of an individual to remain in the United States is determined in administrative proceedings assigned to the Attorney General. The Attorney General has delegated this authority to the Executive Office of Immigration Review. See 28 CFR § 0.115 et seq.

Deportation proceedings are conducted before immigration judges who are assigned by the Executive Office for Immigration Review. The Complainant is the Immigration and Naturalization Service. See generally, 8 CFR § 3.12-3.38.

The Immigration Service is represented by counsel. The conduct of the proceedings is trial like and the determination of deportability is made only upon the record before the immigration judge with the respondent having an opportunity to be present, a right to representation, a right to examine the evidence against him and to present evidence in his behalf, and to cross examine witnesses presented by the government. 8 USC § 1252(b).

As noted above, by regulation the prosecutorial function and adjudicatory functions now rest within separate agencies within the Department of Justice.

In 1980, Congress passed the Equal Access to Justice Act.<sup>1</sup> EAJA was extended and amended in 1985.<sup>2</sup>

1. Equal Access to Justice Act (EAJA) enacted as Pub.L. No. 96-481, tit. II, 94 Stat. 2325 (codified at 5 USC § 504 and 28 USC § 22412(b)-(f) (effective October 1, 1981).

2. Equal Access to Justice Act, Extension and Amendment, Pub.L. No. 99-80, 99 Stat. 183, amending 5 USC § 504 and 28 USC § 2412 (enacted August 5, 1985).

Essentially, "Congress carved the world of EAJA proceedings into 'adversary adjudications' and civil actions". *Sullivan v. Hudson*, 490 US \_\_\_, 109 S.Ct. 2248, 2258 (1989). This case involves the portion of EAJA known as "administrative EAJA" under 5 USC § 504.

This past term in, *Commissioner, INS v. Jean*, 495 US \_\_\_, 110 S.Ct. 2316, 2321 (1990), this court discussed the main purpose of EAJA. This Court stated "... the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." Citing *Sullivan v. Hudson*, 109 S.Ct., at 2253. The Court took particular note of the Congressional findings and purposes set forth at § 202 of Pub.L. 96-481, *Commissioner, INS v. Jean*, 110 S.Ct., at 2322 n11.

Congress found that individuals and other small organizations may be deterred from seeking review of unreasonable governmental action because of the expense involved in vindicating their rights. Because of the greater resources and expertise of the United States, Congress established a different standard for litigation with the federal government than with a private litigant. Section 202(a) and (b) of Pub.L. 96-481. (Reprinted as a note to 5 USC § 504).

In *Sullivan v. Hudson*, 490 US \_\_\_, 109 S.Ct. 2248 (1989), this Court found that EAJA was designed to rectify the Congressionally identified problem of having individuals of modest means be unable to contest unreasonable governmental conduct. Congress' answer was to provide attorneys fees for a prevailing party in a "civil action" or "adversary adjudication" unless the position of the United States was "substantially justified" or where "special circumstances" make an award unjust. 5 USC § 504a(a)(1). This Court had previously examined the meaning of the term "substantially justified" in *Pierce v. Underwood*, 487 US 552 (1988). This is the fourth occasion upon which this Court has had the opportunity to interpret the Equal Access to Justice Act.

Amicus submit that after an examination of the language of the statute in light of EAJA's purposes and legislative history as well as the position of the Administrative Conference of the United States (ACUS), that this Court must conclude that administrative deportation proceedings are "adversary adjudications" within the meaning of 5 USC § 504(a)(1).

The term adversary adjudication is defined in 5 USC § 504(b)(1)(C) as:

'Adversary adjudication' means: (i) An adjudication under § 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license. . .

As the United States is clearly represented in administrative deportation proceedings, the only remaining definitional question is whether these proceedings are "an adjudication under § 554".

The Department of Justice has taken the position that because deportation proceedings are not conducted pursuant to § 554, that EAJA does not apply to these proceedings. The position of the Justice Department stated in its entirety in the Supplementary Information section accompanying the regulation is as follows:

Hearings conducted by the Immigration and Naturalization Service pursuant to 8 U.S.C. § 1226 (exclusion) and 8 USC § 1252 (deportation) are exempt from the requirements of the Administrative Procedures Act, *Marcello v. Bonds*, 349 U.S. 757 (1955). Therefore, the Act does not apply.

46 Fed. Reg. 48, 921 - 48, 922 (Oct. 5, 1981). This position continues to form the INS argument against the application of EAJA fees in deportation proceedings.

It is axiomatic that a determination of Congressional intent begins with the words used by Congress. *INS v.*

*Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Thus, the initial inquiry is whether the phrase "under § 554" has a self evident plain meaning. Application of the "plain meaning rule" presupposes that a statute has a plain meaning. See *National Wild Life Federation v. Marsh*, 721 F.2d 767, 774 (11th Cir. 1983). Where the meaning of a term is not obvious, invocation of the "plain meaning rule" is inappropriate.

In *Newport News Ship Building and Dry Dock v. EEOC*, 462 U.S. 669 (1983), this Court found that the term "discriminate" was not defined and did not have any obviously ordinary meaning. This Court framed its task in terms of determining whether Congress intended merely to set aside its decision in *General Electric Company v. Gilbert*, 429 U.S. 125 (1978), or whether Congress intended to overrule its method of statutory interpretation in that case. The Court looked beyond the terms of the statute to the legislative history which contained criticism from both the House and Senate as to the reasoning in *Gilbert*. See *Newport New Ship Building and Dry Dock v. EEOC*, 462 U.S., at 676 and 678. Where Congress has enacted a statute using a commonly understood word or phrase, such as "damages" or "willful", see *U.S. v. James*, 478 U.S. 597, 604 (1986) and *McGlouglin v. Richland Shoe Company*, 486 U.S. 128 (1988), then it can be fairly be said that a term has a "plain meaning". This is also true where a term is specifically defined by statute in a manner that conveys a "plain meaning". See *Rubin v. U.S.*, 449 U.S. 424, 430 (1981).

However, where a term is susceptible to more than one plausible meaning, then resort to extrinsic sources, such as statements of legislative purpose and legislative history is appropriate. Cf *Newport New Ship Building and Dry Dock v. EEOC*, 462 U.S., at 676.

In *INS v. Cordoza Fonseca*, 480 U.S., at 442-443 and 446, the court examined the legislative history and purpose of the Refugee Act in construing what was a relatively clear statutory directive. *A fortiori* when a

statute such as 5 USC § 504(a) is susceptible to a number of interpretations, the court should consider other evidence beyond the bare words of the statute. Certainly, "statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible. *American Tobacco Company v. Patterson*, 456 U.S. 63, 71 (1982).

The three circuit courts which have specifically addressed this question have divided over whether § 504(a)(1) has a plain meaning. Compare *Escobar-Ruiz v. INS*, 838 F.2d 1020, 1023 (9th Cir. 1988) (en banc) with *Clarke v. INS*, 904 F.2d 172, 175 (3rd Cir. 1990) and *Ardestani v. U.S. Dept. of Justice, Immigration and Naturalization Service*, 904 F.2d 1505, 1508 (11th Cir. 1990). But see *Ardestani v. U.S. Dept. of Justice, INS*, at 1515-1517 (dissenting opinion of Judge Pittman).

In any event, the court should follow the "well established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute". *Bob Jones University v. U.S.*, 461 U.S. 574, 586 (1983). It is axiomatic that the statute should be considered as a whole and the interpretation of the statute should consider all of its language. The language in § 202(b) of Pub.L. 96-481 has to be considered in construing the statute. Congress could not have been more clear in its intentions. The purpose of reducing the deterrent effect of litigating with the federal government would be well served by interpreting "under § 554" to apply to administrative deportation proceedings.

The term is clearly susceptible to different constructions. The term "under § 554" can be reasonably understood as meaning procedures which meet the procedures set out in § 554. In this regard, it is clear that deportation proceedings now provide identical protection to the Administrative Procedures Act. At the time of the *Marcello* decision, the only major distinction was with regard to the issue of mixture of administrative functions. That is, under the Immigration Act, the

"special inquiry officer" could be from the Immigration Service itself, so long as the inquiry officer had not had a prosecutorial role. See 8 USC § 1252(b). Today, as noted above, the Executive Office of Immigration Review is a separate agency within the Department of Justice. Thus, the procedures under the Immigration Act are now identical to the Administrative Procedures Act.

The government relies on the implausible notion that Congress intended to exclude deportation proceedings. This assertion is undermined by the statement of purposes and the legislative history as set forth below.

Further, the court below and the court in *Clarke* have given § 504(a)(1) a narrow construction based on the precept that a waiver of sovereign immunity is to be strictly construed. Amicus submits that this rule of statutory construction has been misapplied as a tool in interpreting Congressional intent regarding the application of EAJA to administrative deportation proceedings.

Both courts relied heavily on several decision from this Court, in particular *Library of Congress v. Shaw*, 478 U.S. 310 (1986) and *Ruckelshaus EPA v. Sierra Club*, 463 U.S. 680 (1983). First, both of these decisions relied primarily upon other presumptions. In *Library of Congress v. Shaw*, the Court relied primarily on the long-standing rule that interest would not be recovered as part of a suit against the government in the absence of a clear waiver of sovereign immunity, *Library of Congress v. Shaw*, *supra*, at 318, "The no-interest rule" provides an added gloss of strictness upon these usual rules. Since the statute in question made no reference to interest, and only touched upon attorneys fees, the Court rejected an expansive reading to reach a result unlikely to have been intended by Congress.

The Court in *Ruckelshaus EPA v. Sierra Club*, *supra*, relied primarily upon the "American rule" against fee shifting to deny a losing party its attorney fee request. The Court's "... basic point of reference ..." was the American rule. In addition, the court stated that

it was also relevant to consider the rule that sovereign immunity would be constrictly construed. *Ruckelshaus, supra*, at 685. The court stated, "in determining what sorts of fee awards are "appropriate", care must be taken not to enlarge § 307(f) waiver of immunity beyond what a fair reading of the language of the section requires". *Ruckelshaus, supra*, at 686.

In addition to having relied upon legal precepts not relevant to the issue before the Court, it is apparent that the two cases merely reflect an understanding that unless a statute can fairly be read to encompass a waiver of sovereign immunity, the Court will not reach out for an expansive ruling.

This Court has this term rejected a similar claim to apply the doctrine of sovereign immunity in *Irwin v. Veterans Administration*, 498 U.S. \_\_\_, 111 S. Ct. 453, 457 (1990) wherein the government argued that equitable tolling principles do not apply to it because a waiver of sovereign immunity must be strictly construed. This Court responded:

Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the Congressional waiver. Such a principle is likely to be realistic assessment of legislative intent as well as a practically useful principle of interpretation.

To the same effect is this Court's decision in *Franchise Tax Board of California v. U.S. Postal System*, 467 U.S. 512, 521 (1984). This Court admonished that a waiver of sovereign immunity need not be accomplished by "a ritualistic formula", rather an intent to waive sovereign immunity can be ascertained by reference to underlying Congressional policy.

EAJA is plainly a remedial statute entitled under general principles of statutory construction to be liberally construed. C. Sands, *Sutherland On Statutory Construction* § 60.01 (Sands, Fourth Edition, 1986 revision). Moreover, it is clear that Congress intended a broad waiver of sovereign immunity in enacting the EAJA. *Commissioner, INS v. Jean*, 110 S.Ct., at 2322 n11 and *Sullivan v. Hudson*, 109 S.Ct., at 2253.

In both cases, this Court has given effect to Congress' intentions that EAJA be construed to effect its primary purpose to eliminate barriers to litigating against unreasonable governmental conduct.

This court's decision in *Sullivan v. Hudson* is particularly instructive. In *Sullivan*, the court rejected the "plain meaning argument" that administrative proceedings conducted on remand from a district court could not be considered a "civil action". Instead, this Court applied the specific purpose of EAJA to find that attorney's fees would be available upon remand. This court would not "... ascribe to Congress an intent to throw the Social Security claimant a life line that it knew was a foot short." *Sullivan* at 2256.

Whatever doubt exists regarding Congressional intent from the face of the statute and its explicit statement of Congressional purpose, is removed by the legislative history. Courts below have debated whether the legislative history was sufficiently compelling to find that EAJA applied to administrative deportation proceedings. Compare *Escobar-Ruiz* with *Clarke* and *Ardestani*. See also *Owens v. Brock*, 860 F.2d 1363 (6th Cir. 1988) and *St. Louis Fuel and Supply Company, Inc. v. FERC*, 890 F.2d 446 (DC Cir. 1989). Perhaps, the legislative history does not compel the result suggested by Amicus if viewed as requiring an overwhelming statement of Congressional intent in opposition to clearly stated contrary language in the statute itself. However, as noted above, the legislative history must only support a "fair reading" of the statute. Read in this light, it is at a minimum convincing.

Had Congress wanted to ensure that only proceedings directly governed by § 554 were to be defined as adversary adjudications, Congress could plainly have done so. In fact, the Senate version of § 504 contained the language "subject to" § 554. See S.Rep. No. 96-253, 96th Cong., 1st Sess., 24-25 (July 20, 1979). As finally enacted "subject to" was changed to "under". It is fair to infer that Congress intended a different meaning by changing the words. It would indeed be ironic that in relying on the plain meaning rule, based upon the notion that Congress means what it says, that when Congress makes a change in language of this sort, that it has no meaning.

It is evident that the limitation to "adversary adjudications" was intended to apply to categories of proceedings and not categories of agencies which happen to fall directly under the APA. The limitation to adversary adjudications was to eliminate rule making or other less burdensome administrative proceedings. See H.R. No. 96-1418, 96th Congress, Second Sess., 14 (Sept. 26, 1980). The joint explanatory statement of the Conference Committee confirms this understanding. The Committee states that the Act, "... defines adversary adjudication as an agency adjudication defined under the Administrative Procedures Act where the agency takes a position through representation by counsel or otherwise." H.R. Conf. Rep. No. 1434, 96th Congress, 2d Sess., 23 (1980). As noted above, the word "under" was substituted for the Senate language "subject to". Thus, the legislative history supports the proposition that the definition of adversary adjudication was intended to apply to certain types of proceedings and not to certain agencies.

A further review of the legislative history reveals a plain intention to define an adversary adjudication in terms of trial type proceedings where the government takes a position and is represented. The original EAJA's legislative history is set forth primarily in the House Report (Judiciary Committee No. 96-1418, September

26, 1980, to accompany S.265); H.R. Report No. 96-1418, 96th Congress, 2d Sess., reprinted in 1980 U.S. Code Congressional and Administrative News 4984 et seq. The House Committee stated:

It is intended that the definition precludes an award in a situation where an agency, e.g. the Social Security Administration does not take a position in the adjudication. If however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial. (House Report No. 96-1435, 23, reprinted in 1980 U.S. Congressional Code Administrative News, at 5012.)

Thus, the language "under § 554" was intended to narrow the scope of administrative EAJA to only certain types of proceedings. The committee further stated:

It also reflects a desire to limit the award of EAJA fees to situations where participants have a concrete interest at stake but nevertheless may be deterred from asserting that interest because of the time involved in pursuing administrative remedies. (H.R. Rep. No. 96-1418, at page 14, 96 U.S. Congressional Code Administrative News, at 93).

Further evidence of Congress' intent is contained in the legislative history of the 1985 amendments enacted as the Equal Access to Justice Act, Extension and Amendment, Pub.L. 99-80. The House Committee once again considered the definition of an "adversary adjudication". The Committee noted that where the Secretary of Health and Human Services provided for representation for the agency before administrative law judges, it would be "precisely the type of situation covered by § 504(b)(1)(C)." H.R. Report No. 99-120, pt. I, 10, (1985), reprinted in 1985 U.S. Code Congressional and Administrative News, at 138-139. It is far from clear that social security benefit determination proceedings are proceedings conducted pursuant to the APA. See

*Richardson v. Perales*, 402 U.S. 389 (1971). It is clear that Congress intended that social security benefit proceedings be considered adversarial whenever the Social Security Administration was represented and took a position. It is only the lack of taking a position and counsel that kept these proceedings from being considered adversarial. See also *Sullivan v. Hudson*, 109 S.Ct. at 2257.

The result suggested by Amicus is further supported by the views of the Administrative Conference of the United States (ACUS). ACUS is the agency Congress designated as having particular expertise with regard to EAJA. Consultation with the Chairman of the Administrative Conference of the United States by each agency before it establishes rules and procedures governing applications for an award of EAJA fees is required at 5 USC § 504(c)(1). Further, the chairman of the Administrative Conference reports annually to Congress on the EAJA. 5 USC § 504(e). Thus, if any agency's views are entitled to deference, it is that of the Administrative Conference and not the Justice Department.

The court below in *Ardestani* inexplicably gives deference to the views of the Justice Department. *Ardestani*, at 1513. In doing so, the Court of Appeals distorted the doctrine of deference to administrative interpretation set forth in *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984).

First, it is clear that the views of the Administrative Conference support Amicus position. Pursuant to its mandate from Congress, the Administrative Conference promulgated model rules. 46 Fed. Reg. 32,900 (1981). Commentary to the model rules is instructive. ACUS proposed a broad interpretation of "under § 554", 46 Fed. Reg. at 32, 901. Part of the commentary is particularly applicable herein.

Considering the purposes of the [EAJA], questions of its coverage should turn on the substance—the

fact that a party has endured the burden and expense of a formal hearing—rather than the technicalities. 46 Fed. Reg. at 32,901.

The Court of Appeals found that because ACUS had the opportunity for consultation with the Department of Justice and did not criticize the Attorney General's interpretation, then the Justice Department's views are entitled to *Chevron* deference. The Court of Appeals plainly reads too much into ACUS' apparent failure to criticize the Justice Department rules. First, it would certainly not have been apparent in 1981 to either ACUS or Congress that deportation proceedings would not be considered to be adversarial adjudications. The first litigation on this issue took place in 1986. See *Escobar-Ruiz*, 787 F.2d 1294 (9th Cir. 1986). To infer that ACUS approved of the Justice Department exclusion of deportation proceedings from the scope of EAJA, buried in its Supplementary Information, would be an extraordinary assumption. In light of this specific discussion by ACUS cited above, it is clear that the views of the Administrative Conference support the application of EAJA to administrative deportation proceedings.

While the legislative history and the stated view of ACUS might not amount to a "clearly expressed legislative intention" which would rebut contrary statutory language, legislative history and administrative view certainly support a "fair reading" of the statute. The courts of appeals rejecting the application of EAJA to administrative deportation proceedings have foundered on the application of an unduly burdensome vision of what Congress must do to waive sovereign immunity. This construct has been used to support an implausible result. Is it unlikely that Congress intended that administrative deportation proceedings be excluded from the definition of adversary adjudications. This implausible result is rebutted by the statement of statutory purpose set forth in § 202(b) as well as the legislative history

replete with concern for individuals who confront unreasonable governmental action and would be deterred from litigating with the government, but for a fee shifting provision.

The limitations enacted by Congress in the definition of an adversary adjudication are apparent. They are aimed at limiting EAJA fees to trial type proceedings where the government was represented and took a position. These limitations were not in any way intended to exclude deportation proceedings which are identical in all respects to § 554 proceedings. Congress' consideration of social security benefit determinations, which are not clearly subject to the APA, is also highly probative of its intention.

Administrative deportation proceedings are precisely the type of proceedings which Congress intended to have the benefits of EAJA fee shifting. It is the classic confrontation between the full power of the federal government over the individual who will often be of modest means. What is at stake for the respondent in deportation proceedings is as important as any civil litigation. This court has stated that "deportation may result in the loss of all that makes life worth living". *Bridges v. Wixon*, 326 US 135, 147 (1945). Moreover, administrative deportation proceedings are the sole trial afforded to that individual. Judicial review is limited. See 8 USC § 1105.

Adequate legal representation for individuals of limited means who may often lack the ability to represent themselves buttress Amicus argument. The facts of *Ardestani* are illustrative of the problem. *Ardestani* was found to have a "well-founded fear of persecution" based on the views of the Bureau of Human Rights and Humanitarian Affairs of the Department of State. The arbitrary action of the Immigration Service in refusing to grant asylum under these circumstances is precisely the type of unreasonable, unthinking governmental conduct Congress sought to deter in enacting EAJA.

The value of counsel in administrative deportation proceedings cannot be overstated. Whether it is in interpreting the meaning of the term "conviction", *Clarke v. INS*, 904 F.2d 172 (3rd Cir. 1990), or in preparing an asylum application, the role of counsel is critical. See also, *United States General Accounting Office, Asylum Approval Rates for Selected Applicants*, Pub. No. GGD -87- 82 FS (June 1987) which reports that asylum applicants who are represented by counsel before immigration judges are three times as likely to receive approval as those who are unrepresented. As recently noted in *Montilla v. INS*, 926 F.2d 162, 170 (2nd Cir. 1991), "a lawyer might well have made a difference in the earlier proceeding—they usually do".

Without the availability of EAJA fees, many uneducated individuals, many of whom with a limited command of the English language, will face the full power of the federal government. Further, they will be faced with a statute considered comparable to our tax laws in complexity. *Lok v. INS*, 548 F.2d 37,38 (2d Cir. 1977). These individuals are less likely to have counsel available without the application of EAJA to successfully oppose unreasonable governmental conduct.

It must be reiterated that administrative deportation proceedings are a trial. Initially, the burden is on the government to establish by clear convincing and unequivocal evidence that the respondent is deportable. *Woodby v. INS*, 385 US 276 (1966). Once deportability has been established there is available to the respondent in deportation proceedings myriad forms of relief requiring the presentation of highly specified proof. These applications include an application for asylum/withholding of deportation pursuant to Sections 208 and 243 of the Immigration and Nationality Act, 8 USC § 1158 and 8 USC § 1253; an application for suspension of deportation pursuant to INA § 244, 8 USC § 1254; waivers of excludability or deportability pursuant to INA § 212(c) and § 241(f), 8 USC § 1182(e) and 8 USC

§ 1251(f). The value of counsel in these complex administrative proceedings cannot be overstated. Further, the danger that these individuals would be subject to arbitrary governmental action is well established.

In summary, a fair reading of the definition of an "adversary adjudication", encompasses the application of EAJA to administrative deportation proceedings, considering the expressed statutory purpose, legislative history, and administrative views of ACUS. Moreover, considering the trial-type proceedings, complexity, and importance of the proceeding, and the need for availability of counsel to ensure a fair proceeding, administrative deportation proceedings are precisely the type of proceeding Congress intended for which EAJA would be available.

## II. § 292 OF THE IMMIGRATION AND NATIONALITY ACT, 8 USC 1362 DOES NOT BAR FEE SHIFTING

The Court of Appeals below found that § 292 of the INA 8 USC § 1362 barred fee shifting. The court reached this result by an extraordinarily torturous route.

Section 292 of the INA provides for a right to counsel in exclusion or deportation hearings at "no expense to the government". It is apparent from the face of this provision enacted in 1952 that it expressed a Congressional intention to deny to respondents in deportation proceeding appointed counsel, i.e. a public defender type system. See *Perez-Perez v. Hansberry*, 781 F.2d 1477 (11th Cir. 1986). On its face, it is implausible that it was intended to be an express bar to fee shifting.

The judicial EAJA provision, 28 USC § 2412(d)(1)(a), has an exception to the award of EAJA fees where fees are "... otherwise specifically provided by statute ...". No comparable provision appears in administrative EAJA. See 5 USC § 504. Nonetheless, the Court of Appeals found that the existence of § 292 was a special circumstance that would make the award of attorney's fees unjust. *Ardestani*, at 1513-1514. See

also *Clarke v. INS*, at 177. The Court of Appeals interpreted § 292 as a bar to its ability to award attorney's fees.

This result lacks any textual basis in the statute and assigns to Congress an intent in § 292 that it could not have had. Congress has made it clear that the exception in judicial EAJA to fee shifting is a narrow one. Congress plainly intended to exempt only civil actions already covered by existing fee statutes. See H.R. Report No. 1418, p. 18, 1980 U.S. Congressional Code, Administrative News, at 4997 and *Escobar-Ruiz*, at 1027. Further, the 1985 Extension and Amendment made it clear that the exception in § 2412 was extremely narrow and applied only to statutes which specifically addressed fee shifting. See *National Wildlife Federation v. FERC*, 870 F.2d 542, 543 (9th Cir. 1989).

There exists a well established body of law under the Social Security Act rejecting a similar argument. The Social Security Act prohibits the collection of fees exceeding 25 percent of the past due benefits in § 405(b). However, the courts have rejected this provision as a limit on fee shifting. See *Watford v. Heckler*, 765 F.2d 1562, 1566 (11th Cir. 1985) (collecting cases) and *Wolverton v. Heckler*, 726 F.2d 580, 582 (9th Cir. 1984). The courts have found this provision did not specifically preclude fee shifting.

Because it is apparent that § 292 deals only with the agency's duty to provide counsel, it is obviously not the type of statute that Congress intended would bar fee shifting.

Congress has made it abundantly clear that only statutes which expressly preclude the award of fees prohibit fee shifting. In *Tulalip Tribes v. FERC*, 749 F.2d 1367, 1368 (9th Cir. 1984), the Court interpreted the Federal Power Act limitation on award of costs contained in 16 USC § 825p to bar an award of fees. In a reaction to *Tulalip Tribes*, Congress amended 28 USC § 2412(d)(1)(A). This broad interpretation of

2412(d)(1)(a) was rejected by Congress. See H.R. No. 120, 99th Cong., 1st Sess., pt. I, at 17.

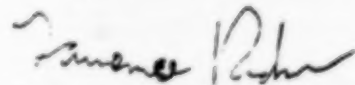
Plainly, Congress intended the limitation on fee shifting to apply only to statutes which clearly on their face barred fee shifting. There is no support in the statutory language, legislative history, or judicial interpretation outside of the deportation context for the result reached below.

It should be plain that there is a distinction between a prohibition on a public defender type system and a statute which provides for fees only when the government's conduct is not substantially justified. These statutes are plainly not inconsistent and the application of EAJA to deportation proceedings does no harm to the text and purpose of § 292.

#### CONCLUSION

Amicus American Immigration Lawyers Association urge that the judgment of the United States Court of Appeals for the 11th Circuit be reversed.

Respectfully submitted,



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#### CERTIFICATE OF SERVICE

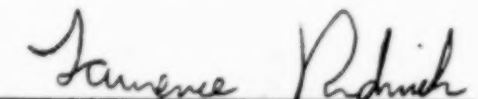
I, LAWRENCE H. RUDNICK, Esquire, hereby certify that a true and correct copy of the attached brief AMICUS CURIAE were served upon the following by prepaid postage first-class mail:

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